court, pursuant to Federal Rule of Civil Procedure 52, judgment was entered in favor of Maas and Lawrence for the full amount sought.

During May 1962, Ets-Hokin contracted with the Air Force for the installation of approximately 1,500 miles of buried cable for the missile complex near Minot, North Dakota. This cable was manufactured in Bonham, Texas and then shipped to certain railheads near Minot. After obtaining the installation contract, Ets-Hokin entered into negotiations with various carriers for the purpose of obtaining an agreement concerning, primarily, the transportation of the cable from the railheads to the point of installation. Maas was one of the carriers involved in negotiations with Ets-Hokin at this time. Maas was ultimately awarded the cable transportation and, on August 31, 1962, the cable hauling was commenced. Maas continued to transport cable until March 5, 1963 when its services were terminated. The controversy herein arises out of a dispute as to the compensation to be awarded Maas and Lawrence for services performed during this period.[2] Maas contends that the transportation services were performed under an express oral contract providing for compensation in accordance with the hourly rate set forth in its intrastate tariff on file with the North Dakota Public Service Commission. On the other hand, Ets-Hokin denies the existence of such an express oral contract and further contends that even if such a contract existed, it would be illegal and unenforceable.

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2. There is a dispute regarding the business relationship of Maas and Lawrence. Ets-Hokin contends that the two companies were involved in a joint venture while both Maas and Lawrence urge that they had merely entered into a leasing arrangement. There is ample evidence in the record to support the trial court's conclusion that "the Intervening plaintiff was a common carrier, who had leased his equipment to the plaintiff for use in the installation of the communications system."

The trial court herein found that during the negotiations between Maas and Ets-Hokin regarding transportation services, the former submitted an oral offer to perform the desired transportation services at an hourly rate. The court further found that Ets-Hokin accepted this offer when it instructed Maas to commence hauling operations—thereby finding that an express oral contract based on an hourly rate of compensation existed between Maas and Ets-Hokin. In considering a trial court's factual determinations, due regard must be given to the opportunity of the trial court to evaluate the credibility of the witnesses. Such factual determinations should not be set aside on appeal unless the Court of Appeals determines that they are clearly erroneous. *General American Life Ins. Co. v. Tarbaugh,* 360 F.2d 562 (8th Cir., 1966). After reviewing the record in this matter, the Court finds that there is substantial evidence supporting the trial court's determination that an express oral contract for transportation services existed between Maas and Ets-Hokin and that compensation was to be based on the hourly rate set forth in Maas' North Dakota intrastate tariff. The trial court's determination on this point is affirmed.

Ets-Hokin further contends that even if an express oral contract based on an hourly rate existed, it was illegal and thus unenforceable. Ets-Hokin premises its contention upon the fact that a three judge federal court previously rendered a decision that the truck movement of cable manufactured in Texas from the railheads located in North Dakota to the installation point near Minot, North Dakota was interstate commerce since the movement was a portion of the transportation of the cable from Texas to its ultimate destination. *Great Northern Ry. v. Thompson,* 222 F.Supp. 573 (D.N.D. 1963). It is thus now apparent that Maas was engaged in interstate commerce in hauling

the cable from the railheads to installation points.[3] In this connection, the trial court found that Maas did not, "at the critical time, have or rely on any applicable interstate tariff." This finding is not disputed by Maas. It is thus obvious that in hauling the cable pursuant to its agreement with Ets-Hokin, Maas was in violation of federal laws governing interstate commerce. See 49 U.S.C. 301 et seq. Ets-Hokin urges that this violation renders any express oral contract it may have had with Maas illegal and, thus unenforceable. We disagree.

A contract in violation of a statutory provision generally is void or illegal only if the legislative body enacting the statute evidences an intention that such contracts be considered void or illegal. See, *e.g.*, *McCullough Transfer Co. v. Virginia Sur. Co.*, 213 F.2d 440 (6th Cir. 1954); *Macco Const. Co. v. Farr*, 137 F.2d 52 (9th Cir. 1943); *Guffey-Gillespie Oil Co. v. Wright*, 281 Fed. 787 (8th Cir. 1922); *Talco Capital Corp. v. Canaveral Int'l. Corp.*, 225 F.Supp. 1007 (S.D. Fla. 1964); 17 C.J.S. § 202 at 1007 (1963); otherwise, even though the parties to a contract may be subject to a statutory penalty as the result of performing a contract, the contract itself remains in full force and effect. In the instant case, Maas was in violation of the Motor Carrier provisions of the Interstate Commerce

3. The decision finding the cable transportation to be of an interstate character was not rendered until after Maas ceased hauling cable on this particular operation. There is evidence in the record indicating that at the time Maas was conducting the hauling operation, the parties to the agreement believed that the hauling operation was of an intrastate character. Contrary to the contract under consideration in *Empire Box Corp. v. Willard Sulzberger Motor Co.*, 104 F.Supp. 762, 765 (D.N.J. 1952) (cited by Ets-Hokin), the contract between Maas and Ets-Hokin was clearly not designed to evade the motor carrier provisions of the Interstate Commerce Act. It should also be noted that Maas later filed a tariff, identical to the intrastate tariff, with the Interstate Commerce Commission. This interstate tariff became effective November 8, 1962 which was during the progress of the work under the contract.

Act when it transported cable under its contract with Ets-Hokin and was subject to penalties for such violations. The cable transportation contract itself, however, would be void, illegal or unenforceable only if Congress, in passing the Motor Carrier provisions of the Interstate Commerce Act, intended that contracts resulting in violations of that portion of the Act be illegal and void. A review of the statutory provisions involved herein reveals no congressional intention to make contracts in violation thereof void or illegal.[4] The contract between Ets-Hokin and Maas was valid and enforceable.

Appellant further contends that:

> "The court erred in the following conclusion of law (R. 491): 'that by the terms of the contract, plaintiff's services were subject to termination by defendant at any time upon notice, and that any inefficiencies which might have existed in the plaintiff's performance under the contract were waived by knowingly acquiescing in the continued performance by plaintiff' (This assigned

4. The congressional policy with respect to the Motor Carriers Act is set forth in the historical note preceding 49 U.S.C. § 301. The policy is stated in the following manner: "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13 and 19 of this title], so administered as to recognize and preserve the inherent advantages of each: to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing coordinating and preserving a national transportation system by water, highway, and rail as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

error covers like errors in conclusions of law 3-6, R. 492.)[5]" Brief for appellant p. 55.

This being a diversity action, the law of North Dakota governs the estoppel issue. *James Talcott, Inc. v. Associates Discount Corporation,* 302 F.2d 443, 446 (8th Cir. 1962); *Kelly Tire Service, Inc. v. Kelly-Springfield Tire Co.,* 338 F.2d 248 (8th Cir. 1964). In *Rath v. Armour and Company,* 136 N.W.2d 142, 148 (N.D. 1965) the Supreme Court of North Dakota reviewed the doctrine of estoppel as follows:

> Section 31-11-06, N.D.C.C., provides that: "When a party, by his own declaration, act or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, he shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission." The effect of this section is to enact into substantive law the equitable principle of estoppel and render it cognizable in both law and equity. *Neset v. Rudman,* N.D., 74 N.W.2d 826. In *Werner v. Werner,* 74 N.D. 565, 23 N.W.2d 757, this court said: "An essential element of equitable estoppel is a representation which may consist of words, acts or silence, believed and relied upon by the party claiming the benefit of the estoppel which induced him to act or refrain from acting, to his prejudice." *Rath et al. v. Armour and Company,* N.D., 136 N.W.2d 142, 148. Also see: *Kunick, et al. v. Trout,* N.D., 85 N.W.2d 438, 448.

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5. Conclusions of law 3-6, R. 492 (Record p. 492) are as follows:
   3. That the Plaintiff fully performed its obligations pursuant to the terms of the oral contract entered into between the Plaintiff and Defendant in a satisfactory and workmanlike manner.
   4. That the Defendant's acts, representations, and omissions (including the acceptance and solicitation of Plaintiff's services, and silence as to complaints, now made and tacit and expressed approval as to some of the actions of Plaintiff which constitute the grounds of such alleged complaints) successfully secured to it the continuous services of Plaintiff, which services were essential to the performance and completion of Defendant's own obligations under its prime contract, during all

No useful purpose would be served by setting out herein the record which supports the conclusions of the trial court. Suffice to say they are amply supported by the evidence and the law applicable thereto.

Finally, Ets-Hokin urges that the trial court erred in awarding Maas interest from and after the invoice date. A North Dakota statute provides:

> Every person who is entitled to recover damages certain or capable of being made certain by calculation, the right to recover which is vested in him upon a particular day, also is entitled to recover interest thereon from that day, except for such time as the debtor is prevented by law or by the act of the creditor from paying the debt. N.D. Cent. Code § 32-03-04 (1960).

See also, *Jacobson v. Mutual Benefit Health & Accident Ass'n*, 70 N.D. 566, 296 N.W. 545 (1941).

The trial court having found that Maas and Ets-Hokin had entered into an express oral contract and that Maas had performed its obligations pursuant thereto, it was just and proper that interest be awarded from the invoice date.

Upon review of the entire record, the findings, conclusions and judgment of the trial court are affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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of which time the plaintiff believed, and had reasonable cause to believe, that such services (performed in good faith by Plaintiff) were wholly satisfactory and were being performed and furnished at an agreed price—which understanding and belief of the Planitiff was known to Defendant, and was due to the actions, representations, and omissions aforesaid on the part of the Defendant, which were relied upon by Plaintiff.

5. That it would be unconscionable to permit Defendant to maintain a position inconsistent with the terms and conditions of the oral contract, the performance of which is acquiesced in and the Defendant is and should be estopped from so doing.

6. That the Defendant's position is devoid of equity.

Appendix B

Memorandum and Order—District Court.

[Title of Court and Cause Omitted]

[Filed in U. S. District Court on Aug. 8, 1966.]

Following trial of the issues without a jury, and the submission of after trial briefs, the Court finds and makes its order as follows:

This diversity action is one for money damages as compensation for motor carrier transportation services rendered by the Plaintiff between September 1, 1962, and March 5, 1963, inclusive. The Intervening Plaintiff is a citizen of North Dakota; jurisdiction is established.

During the pertinent times here involved Defendant was the prime contractor for the installation of a communication system for Minuteman Wing No. 3, Minot, North Dakota, and Plaintiff was a common carrier, licensed as such by the North Dakota Public Service Commission, with a tariff filed with said Commission as required by law. The services performed by Plaintiff, and for which compensation is sought, consisted of transporting full and empty cable reels by truck between various railheads and designated sites within the missile complex. Cable was transported from Bonham, Texas, by rail to various designated points on the Soo Line Railway for further ex-rail transportation by truck to locations intermediate to the missile and control center sites. The cable reel was placed by said motor carrier at designated locations, and the return movement of empty cable reel began in the field locations and thence back to the railhead for trans-shipment by rail to Bonham, Texas.

Defendant admits that it owes one or both of the Plaintiffs compensation for the services performed, but denies the correctness of the amount alleged—$90,990.75. Since liability is conceded, the sole and ultimate issue for de-

termination is the amount to which either or both of the Plaintiffs are entitled.

Defendant contends that the legal relationship of the Plaintiff and Intervening Plaintiff was in the nature of a joint venture, and that such joint venture did not have, at the critical time, an interstate tariff applicable and effective regarding these cable shipments, and that under those circumstances the rights of the respective parties are governed by common law principles of contract. United States v. Maxwell C. Garner, 313 I. C. C. 139. Plaintiff argues that the relationship between it and the Intervening Plaintiff was that of lessor-lessee, involving certain equipment used in the performance of its services. Notwithstanding these divergent positions, it clearly appears that the shipments of cable reel here involved were interstate in character (see Great Northern Railway Company v. Thompson et al., 222 F. Supp. 573) and that the Plaintiff did not, at the critical time, have or rely on any applicable interstate tariff (Tr. 147-8). Furthermore, Plaintiff and Intervening Plaintiff have stipulated and agreed that the judgment to be herein entered may and should be entered in their favor jointly. Hence, in the Court's view, the Defendant will be amply protected.

Concluding the negotiations (between Plaintiff, represented by its President, Mr. Maas, and the Defendant, represented by Mr. Frager, its Project Manager) concerning the transportation of the cable reels, and prior to the commencement of the services performed by Plaintiff, an oral contract was entered into. In effect, during the pre-contract negotiations Mr. Maas had submitted an oral "bid" or "offer" to Mr. Frager, clearly stating the terms whereby Plaintiff would furnish the men and equipment and transportation services desired by De-

fendant, which offer was fully understood by both parties, and which was unconditionally, knowingly and intentionally, accepted by the Defendant by Mr. Frager's directing and ordering Plaintiff, on August 30th or 31st, to unload cars at Voltaire, North Dakota, and get his equipment on the job. Said contract thereafter remained in full force and effect until terminated by notice in accordance with one of the provisions thereof. In substance, and by the express terms of the oral contract, Plaintiff agreed to perform the necessary transportation services (including the furnishing of the necessary men and equipment required) when notified of the need therefor by the Defendant. It was further agreed, by the express terms of the oral contract, that the consideration or compensation to be received by Plaintiff for the performance of such services was to be in accordance with the hourly rates set forth in Plaintiff's intrastate tariff on file with the North Dakota Public Service Commission; and, further, that said contract and Plaintiff's services to be performed thereunder could be terminated by the Defendant, at any time, upon notice to the Plaintiff. The Court is satified that, while Plaintiff's intrastate tariff was not, per se, applicable, the rates therein scheduled were, by reference thereto, incorporated in the oral contract and therein agreed to be the amount or basis of compensation to be paid by Defendant for the services to be performed by Plaintiff under the contract. Therefore, thereby the intrastate tariff was made the basis upon which payment for Plaintiff's services was to be made.

While Defendant denies that the terms of the oral contract required that Plaintiff be paid on an hourly basis, it concedes that such was one of the prime topics of conversation during the preliminary negotiations, but contends that thereafter a firm price (on a ton basis)

was reached and agreed upon, which price was arrived at by estimating from the hourly schedule contained in Plaintiff's intrastate tariff. This issue is resolved in favor of Plaintiff.

At the time of the pre-contract negotiations, it is clear that the prime concern of Mr. Frager, as Project Manager, insofar as the matters here at issue are concerned, was to make arrangements for the transportation of the cable reels by dependable and responsible carrier. (Tr. 373). At that time it was apparent to any experienced carrier (and also to Defendant) that there were many variables and uncertainties which would affect to substantial degree the reasonable value of the required transportation services. Defendant could not, and did not, purport to guarantee that the cable reels would arrive in proper sequence. The extent to which the ultimate contract price would be affected by delay in delivery of the cable reels, and/or delivery out of sequence, is apparent (Tr. 50, and pp. 308-10). That such fact was well recognized by Defendant is evidenced by the character and amount of the claim subsequently submitted by Defendant to the Government (Tr. 306-9; Pl. Exh. 133). It was apparent to all parties that the required services would likely be performed during those months which were normally considered the winter, sub-zero season of the year in North Dakota. The effect of such climatic conditions upon the operation of equipment, road restrictions and travel (both upon the roads and highways and between delivery sites) was within the personal knowledge of Mr. Maas. Whether Defendant promptly and efficiently performed its obligations to clear the rights of way and stake and blade travel areas from the rights of way to the delivery sites, would affect the ease and expedition with which Plaintiff could perform its contract obligations.

It is undisputed that, prior to the subject contract, Plaintiff had performed a substantial amount of hauling on the Minot missile complex for other parties—including Bethlehem Steel Corporation and Peter Kiewit—and that for such services Plaintiff charged, and was paid, on the basis of an hourly rate based upon the intrastate tariff filed with the North Dakota Public Service Commission. It is undisputed, too, that Mr. Maas informed Mr. Frager of such hauling and charges during the negotiations between the parties hereto (Tr. 20-3 and 78-9).

Mr. Maas testified that throughout the negotiations between himself and Mr. Frager the only basis upon which he would agree to perform was on an hourly basis, and that any discussion as to tonnage rates was had only in an attempt to arrive at some estimate of a tonnage rate, based, however, on the hourly rate (Tr. 82, 230-1). Such arrangement is consistent with Plaintiff's other contracts heretofore mentioned, and is substantiated by the testimony of Mr. Lawrence (Tr. 264) and Mr. Lawson (Tr. 531). Additionally, it is wholly consistent with Plaintiff's subsequent conduct and actions. (See, for example, Pl. Exh. 128, and Tr. 47 and 48, and invoices submitted by Plaintiff and received by Defendant.)

Defendant contends that an agreement or contract for carrier services such as those performed by Plaintiff herein, on an hourly rate, is so unreasonable—in view of the claimed fact that it could have contracted with the Great Northern Railway on a fixed or tonnage rate—that it is virtually incredible. In this regard it is interesting to note the testimony of Defendant's witness Heimbach, an employee of the Great Northern Railway Company who had a vast amount of trucking experience. Great Northern, according to Mr. Heimbach's testimony, had an operation serving the missile complex in Montana, and had the con-

tract to install the cable for Defendant in the Montana complex. Also, according to that testimony, the Montana contract or business was competitive, and the rates therein were based on what is referred to as the "Henry Lambert Trucking Company, Inc., Motor Freight Tariff No. 1" (Tr. 496). That company was "actively soliciting Bethlehem Steel for their traffic and had handled Bethlehem Steel's traffic in the past . . .", Bethlehem Steel being the prime contractor on that whole missile complex (Tr. 497). Yet, it clearly appears that, prior to the formation of the contract here involved, Plaintiff was hauling for Bethlehem Steel on the Minot complex on an hourly rate (same basis as here contended by Plaintiff), which fact was known by Defendant at the very time it was being solicited for the subject contract by Great Northern representatives. Also, according to Mr. Heimbach's testimony (Tr. 522-3), the bid from Great Northern for the work performed by it after termination of the subject contract ". . . really wasn't a firm bid. It was a bid based upon the information furnished us . . .", and the "bid" was actually an "estimate" and, in fact, certain factors thereafter arose which eventually affected the actual billing.

The Court also notes the testimony of Mr. Hoffman, General Agent of the Great Northern Railway Company. It appears that this witness was actively soliciting the business covered by the subject contract and had conversations relative thereto with Mr. Frager in the summer of 1962 (June 29 and again on July 9), which conversations were ultimately reduced to telegrams to other Company officials (Tr. 471-4). The telegram summarizing the July 9 conversation (Def. Exh. HH-1, Tr. 473) contains the following: "Suggested that he talk with Ed Metcalf, Bethlehem Traffic Dept., Minot, for comparison of service,

equipment and costs, comparing Great Northern with Maas as this would give him a good idea as to how Maas' hourly rates compare to our tariff published cost which would be same bases they would be operating under." (Emphasis added.) This testimony and evidence was elicited from Defendant's own witness, and conclusively indicates that at the times he (Mr. Hoffman) talked with Mr. Frager, he was aware that Plaintiff's bid was based on an hourly rate, and that efforts were to be made to convince Mr. Frager that the Great Northern bid would result in lower cost to the Defendant for the services required. That Mr. Frager also had this knowledge and understanding during the conversations with Mr. Hoffman must be necessarily assumed, as that was of the very essence of the discussions.

The Court is satisfied that on August 31, 1962—the date on which Plaintiff commenced to perform under his contract—all prior negotiations had culminated in a binding oral contract; that there was a mutual meeting of the minds concerning the essential terms as heretofore stated; and that there was mutual assent to the terms of the contract, which terms were then fully and completely understood by the respective parties. Metzler et al. v. O. J. Barnes Co. (N. Dak.), 226 N. W. 501.

Defendant contends, and introduced evidence in an attempt to so establish, that in the performance of its services the Plaintiff used unnecessarily heavy equipment—for example, that a fork-lift could have been used in the unloading operating at the railhead, instead of truck number 70, which was an "outlaw," or that a lighter truck could have been used for the "ginning" operation—and that fewer men could have and should have been employed, and that in certain particulars the Plaintiff's performance

was inefficient and excessively costly. However, the Court is satisfied from all the evidence that, from time to time, Mr. Frager was informed of the method of Plaintiff's operation, and of the approximate cost to the Defendant, and that no objection thereto was made (Tr. 113-4). It is undisputed that Defendant was represented at the railheads by Mr. Sylvan Olsen, who was thoroughly familiar with the operations at those sites—including number of men and type and character and amount of equipment used—and that he made no complaint to Plaintiff. In fact, according to the uncontradicted testimony of Mr. Maas, Mr. Olsen expressed his opinion that no men employed in the unloading operation at the railroad sites could be spared or taken off the job (Tr. 119-20). The comments made by Mr. Miley (Defendant's representative) to Mr. Maas at a time Maas requested payment on the basis of a prior billing (Tr. 116-18) and at the time of a hearing on Plaintiff's application for permanent authority from the Interstate Commerce Commission (Tr. 121-27) indicate satisfaction with Plaintiff's services and negate Defendant's present contention. This evidence stands uncontradicted. It is clear that by one of the terms of the express oral contract, Plaintiff's services were subject to termination by the Defendant at any time, upon notice. The exercise of such contract provision by Defendant was simple—just informing Plaintiff to discontinue its services, as Defendant ultimately did. In the Court's opinion, based upon all the evidence, the present complaints of Defendant as to alleged inefficiencies on the part of Plaintiff in its performance under the contract were waived by knowingly acquiescing in the continued performance by Plaintiff.

It is the further opinion of this Court that the facts as disclosed by the evidence herein give rise to an equitable

estoppel. Since jurisdiction is based upon diversity of citizenship and the amount in controversy, North Dakota law governs in determining the legal issues presented.

> "Section 31-11-06, N.D.C.C, provides that: 'When a party, by his own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and to act upon such belief, he shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission.' The effect of this section is to enact into substantive law the equitable principle of estoppel and render it cognizable in both law and equity. Neset v. Rudman, N. D., 74 N. W. 2d 826. In Werner v. Werner, 74 N. D. 565, 23 N. W. 2d 757, this court said: 'An essential element of equitable estoppel is a representation which may consist of words, acts or silence, believed and relied upon by the party claiming the benefit of the estoppel which induced him to act or refrain from acting to his prejudice.'" Rath et al. v. Armour and Company, N. D., 136 N. W. 2d 142, 148. Also see: Kunick et al. v. Trout, N. D., 85 N. W. 2d 438, 448.

It appears that North Dakota law regarding the doctrine or principle of equitable estoppel is in accord with that generally recognized. For excellent discussions of such principle, see: James Talcott, Inc. v. Associates Discount Corporation et al., 8 Cir., 302 F. 2d 443; Kelly Tire Service, Inc., et al. v. Kelly-Springfield Tire Co., 8 Cir., 338 F. 2d 248; First National Bank of Portland v. Dudley, 9 Cir., 231 F. 2d 396; Albert v. Joralemon, 9 Cir., 271 F. 2d 236; and Fort Smith Tobacco & Candy Co. v. American Guarantee and Liability Insurance Company, D. C., W. D. Ark., 208 F. Supp. 244, 262-3.

The evidence is such that Defendant comes squarely within the provisions of Section 31-11-06, N. D. C. C., supra, and the interpretation placed thereon by the Supreme Court of North Dakota. It would be unconscionable to permit Defendant to reap the benefits of the defenses presented in this lawsuit—particularly in view of the rather unique fact that Plaintiff's services could have been terminated by the unilateral action of the Defendant at any time it desired to take such action. It is noted that, even at the time Plaintiff's services were terminated, there was no indication given by the Defendant that there was any dispute as to the basis upon which such services had been billed, and even in Defendant's reply to Plaintiff's last written request for payment there is no such expressed contention. (See Plaintiff's Exhs. 127 and 128, and Tr. 46-8.)

If, during performance of this contract by Plaintiff, the position of the Defendant was as it has been since the inception of the litigation based thereon, it would appear that only one inference or conclusion can be reasonably drawn from the whole evidence in the case—and that is, a deliberate attempt on the part of the Defendant to take advantage of Plaintiff, to the latter's financial detriment. Defendant's act, representations, and omissions (including the acceptance and solicitation of Plaintiff's services, and silence as to complaints now made and tacit and expressed approval as to some of the actions of Plaintiff which constitute the grounds of such alleged complaints) successfully secured to it the continuous services of Plaintiff, which services were essential to the performance and completion of Defendant's own obligations under its prime contract, during all of which time the Plaintiff believed, and had reasonable cause to believe, that such services (performed in good faith by Plaintiff) were wholly satisfactory and

were being performed and furnished at an agreed price—which understanding and belief of the Plaintiff was known to Defendant, and was due to the actions, representations, and omissions aforesaid on the part of the Defendant, and which were relied upon by Plaintiff. In the Court's opinion, Defendant's position is devoid of equity.

Plaintiff is entitled to judgment as prayed for in the complaint. Counsel therefor will prepare and submit appropriate findings of fact, conclusions of law, order for judgment and judgment, in conformity herewith.

It Is So Ordered.

Bismarck, North Dakota, this 8th day of August, 1966.

GEORGE S. REGISTER,
Chief Judge.

Appendix C

(1) Section 217(a) of the Interstate Commerce Act, Part II; Motor Carriers (Feb. 4, 1887, c. 104, Pt. II, § 217, as added Aug. 9, 1935, e. 498, 49 Stat. 560, and amended Sept. 18, 1940, c. 722, Title I § 22(e), 54 Stat. 925) 49 U.S.C.A § 317(a):

(a) Every common carrier by motor vehicle shall file with the Commission, and print, and keep open to public inspection, tariffs showing all the rates, fares, and charges for transportation, and all services in connection therewith, of passengers or property in interstate or foreign commerce between points on its own route and between points on its own route and points on the route of any other such carrier, or on the route of any common carrier by railroad and/or express and/or water, when a through route and joint rate shall have been established. Such rates, fares, and charges shall be stated in terms of lawful money of the United States. The tariffs required by this section shall be published, filed, and posted in such form and manner, and shall contain such information, as the Commission by regulations shall prescribe; and the Commission is authorized to reject any tariff filed with it which is not in consonance with this section and with such regulations. Any tariff so rejected by the Commission shall be void and its use shall be unlawful.

(2) Section 217(b) of the Interstate Commerce Act, Part II; Motor Carriers (Feb. 4, 1887, c. 104, Pt. II, § 217, as added Aug. 9, 1935, c. 498, 49 Stat. 560, and amended Sept. 18, 1940, c. 722, Title I § 22(e), 54 Stat. 925) 49 U.S.C.A. § 317(b):

(b) No common carrier by motor vehicle shall charge or demand or collect or receive a greater or less or different compensation for transportation or for any service in con-

nection therewith between the points enumerated in such tariff than the rates, fares, and charges specified in the tariffs in effect at the time; and no such carrier shall refund or remit in any manner or by any device, directly or indirectly, or through any agent or broker or otherwise, any portion of the rates, fares, or charges so specified, or extend to any person any privileges or facilities for transportation in interstate or foreign commerce except where such as are specified in its tariffs: *Provided,* That the provisions of sections 1(7) and 22 of this title shall apply to common carriers by motor vehicles subject to this chapter.

(3) Section 217(d) of the Interstate Commerce Act, Part II; Motor Carriers (Feb. 4, 1887, c. 104, Pt. II, § 217, as added Aug. 9, 1935, c. 498, 49 Stat. 560, and amended Sept. 18, 1940, c. 722, Title I § 22(e), 54 Stat. 925) 49 U.S.C.A. § 317(d):

(d) No common carrier by motor vehicle, unless otherwise provided by this chapter, shall engage in the transportation of passengers or property unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter.

Appendix D

National Transportation Policy. Act Sept. 18, 1940, c. 722, Title I, § 1, 54 Stat. 899, amended the Interstate Commerce Act [chapters 1, 8, 12, 13 and 19 of this title], by inserting before Part I thereof (chapter 1 of this title) the following provision entitled "National Transportation Policy": "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act [chapters 1, 8, 12, 13 and 19 of this title], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."